

No. 14,955

IN THE

United States Court of Appeals
For the Ninth Circuit

EDWARD RAYMOND EGE, JOSEPH BOYD
and JOSEPH VICTOR BRUNO,

Appellants,

VS.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT JOSEPH BOYD'S OPENING BRIEF.

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APPELLANT JOSEPH BOYD'S OPENING BRIEF.

Appellant Joseph Boyd having been convicted by a jury of having conspired with the other appellants above named to knowingly transport women between California and Arizona and between California and Nevada for the purpose of prostitution (18 U.S.C. sec. 2421), the court sentenced him to five years imprisonment (R. 50). From such judgment and sentence Joseph Boyd prosecutes this his appeal.

JURISDICTIONAL STATEMENTS.

1. *Jurisdiction of the District Court.* 18 U.S.C. Section 3231 provides that "The district courts of the

United States shall have original jurisdiction * * * of all offenses against the laws of the United States.”

2. *Jurisdiction of this Court upon appeal* is invoked under the provisions of Title 28 U.S.C. Sections 1291 and 1294.

3. *Pleadings necessary to show the existence of the jurisdiction* are the indictment (R. 3) and appellant's plea of not guilty (R. 8).

4. *Facts disclosing the basis upon which it is contended that the District Court had jurisdiction and this Court has jurisdiction to review the judgment in question will be stated more fully in the following abstract of the case.*

STATEMENT OF THE CASE PRESENTING THE QUESTIONS INVOLVED AND THE MANNER IN WHICH RAISED.

1. The indictment and pre-trial proceedings.

The first count of the indictment charged Edward Ege *alone* with violating 18 U.S.C. Section 2421 by transporting a woman in interstate commerce from San Francisco, California, to Scottsdale, Arizona, for the purpose of prostitution (R. 3). Ege was found guilty of this charge (R. 30).

The second count charged appellant together with appellants Ege and Bruno with conspiring, at a time and place unknown to the grand jury, to knowingly transport women between California and Arizona and between California and Nevada for the purpose

of prostitution (R. 3). This charge is followed by 14 overt acts (R. 4) of which 9 thereof are alleged to have been committed within the jurisdiction of the District Court for the Northern District of California, viz.: Overt Acts, 1, 2, 3, 4, 5, 8, 10, 11 and 12.

Joseph Bruno moved for a bill of particulars (R. 11) as to the following matters: (1) the name of the person described as "a woman" in count one, (2) names of the women whom defendants are alleged to have conspired to transport in count two between California and Arizona, (3) names of the women whom defendants are alleged to have conspired to transport between California and Nevada, (4) date and circumstance of each alleged act of transportation between California and Arizona, and California and Nevada, (5) the day of the month upon which each of the overt acts are alleged to have taken place, and (6) the day in October, 1953 when Bruno allegedly drove Constance Marie Bell from Bakersfield, California, to Delano, California.

In response to the foregoing motion the United States attorney furnished each of the defendants with a bill of particulars (R. 15) specifying as follows:

As to count one that "the woman" was Constance Marie Bell and was one of the women referred to in count two and the overt acts thereunder.

As to count two that Constance Marie Bell was one of the women whom defendants conspired to transport between California and Arizona and California and Nevada. That the approximate date on which each overt act took place was as follows:

- (1) On or about June 15, 1953.
- (2) On or about September 15, 1953.
- (3) On or about September 15, 1953.
- (4) On or about October 13, 1953.
- (5) On or about October 20, 1953.
- (6) On or about October 22, 1953.
- (7) On or about October 22, 1953.
- (8) On or about October 25, 1953.
- (9) On or about October 27, 1953.
- (10) On or about November 5, 1953.
- (11) On or about November 10, 1953.
- (12) On or about December 7, 1953.
- (13) On or about December 20, 1953.
- (14) On or about December 22, 1953.

Appellant Boyd moved the court for an order for a separate trial on count two of the indictment (R. 21). His codefendant made a similar motion (R. 22). The court denied each such motion (R. 25).

2. The evidence, objections thereto and rulings thereon.¹

Constance Marie Bell testified in substance as follows:

I was born in 1934 (R. 58). While I was working at the Burlesque Follies in San Francisco, I met the defendant Ege at the Sarong Club on Geary Street

¹The court stated he was going to allow all matters in evidence against all defendants. That at the proper time counsel could make motions relative thereto. (R. 62.)

(R. 61). I went to Ege's house on Monterey Boulevard where we talked about "the racket" (R. 62). By "racket" I mean prostitution.² There was a discussion about prostitution; I didn't know anything about it and Ege told me how much you got for it and different places you work; how the money was split and about bringing home the money to him (R. 66). He told me how the business was run; how the houses would take one half and I get the other half; about the life and the "racket"; about nice places and new clothes and different things. I stayed at Ege's about a week. After a week I went to this place in Folsom that Ege opened up; I went to work there; prostitution went on in this place in Folsom. I stayed there about a week and engaged in acts of prostitution and I gave Ege the money I earned (R. 69). This was in the latter part of September, 1953 (R. 70); then Ege came and took me back to Monterey Boulevard in his Cadillac car where I stayed for a while while they hunted for a job for me (R. 70). Ege finally said he had found a job for me in Phoenix. This other girl was going down and Ege said we could go down together and share the expenses. I knew this other girl as Judy Berg. Judy Berg and I went to Phoenix together (R. 71). Ege gave me \$50 as my share of the expenses. We went to Phoenix in Judy's car. On the way we stopped in Delano about one half hour.

²Attorney for Boyd objected that the *corpus delicti* had not been laid as to the conspiracy and objected to all conversations the witness Bell had with Ege as having no bearing and being incompetent, irrelevant and immaterial. (R. 63.) The court overruled the objection and said at a later date that he would sift the "weed from the chaff". (R. 64.)

We arrived in Phoenix before noon (R. 72). Ege told Judy that when we arrived in Phoenix she was to phone Joe Boyd at a motel or someplace and he wasn't there. I don't know how she did get in touch with him. It was either through the maid or Eddie left a message at the motel for her or called some other number, but I don't know how it was. We went to this maid's house in Phoenix (R. 73); when we arrived at this maid's place, we made some phone calls. Judy made one and I made one. I don't know who Judy called. The maid and her husband drove us to Scottsdale. At Scottsdale there was a girl called Ginger running the place; she was supposed to be with Joe Boyd. I saw Boyd there on the following days. After the first day, I started working as a prostitute (R. 75); I got a message that Ege was going to call me at this phone booth at a gas station which was not far from the house. Ege did call me.³ Ege asked how the business had been and I said it was bad and he said Delano was open and so I went to Delano. The defendant Ege suggested that I go to Delano and said I was to fly there because they were short of girls. I earned a couple of hundred dollars at Scottsdale; 50% went to the house and 50%—about \$200 went to me (R. 77), out of which I paid 10% for room and board. Over the telephone Ege told me that when I got to Los Angeles, I was to phone a number in Delano that he gave me and I was to let him know what time my flight would arrive in

³The court stated that it was understood that the objections as to hearsay testimony was to continue. (R. 76.)

Bakersfield. Ege told me I was to call Joe Bruno. When I arrived in Bakersfield, Joe Bruno was there to pick me up. He was driving a Cadillac. He took me to Delano at his house (R. 78). There Bruno told me that the house was his and his old lady's; a girl named Kitty. I did not meet Kitty in Delano. I worked at this place in Delano for about three weeks and earned about seven or eight hundred dollars as my share (R. 79). Bruno was there almost every night; he would sit in the kitchen every night until it was time to check out, then he would help count the money. From Delano I went to Fresno where Ege came and picked me up and we went back to San Francisco to Monterey Boulevard where I stayed a few weeks and during which time I went to Sacramento and Isleton. Both places were houses of prostitution. The money I got in Delano, Ege took away from me in Fresno. I am not sure whether I gave Ege the money I earned in Isleton (R. 81). Ege told me that all the girls gave their money to the man that they were with (R. 82). I quarreled with Ege over the money and I wanted to go away and be on my own, but Ege said it just wasn't done. He pushed me around and one time he chased me with a knife. He told me that if I was ever arrested for working in a house, I wasn't to say anything (R. 83). Then I went to Barstow (R. 84). Ege told me about this job in Barstow and for me to get ready and go. It was a little place outside of Barstow called Newberry where I stayed a couple of weeks. When the place got raided (R. 85), I went to jail and then got out on bail (R. 86).

I phoned to somebody in Las Vegas and they told me to wait at Barstow and Ege would come and get me, which he did, in his Cadillac, and then we went to Las Vegas (R. 87). After a few days, I quarreled with Ege and came back to San Francisco on the bus (R. 88). It was around Christmas in 1953 that we left Las Vegas. From Christmas, 1953, I broke off with Ege as far as any financial transactions with him were concerned (R. 91).

(Cross-Examination.)⁴ In September of 1953, I was introduced to Edward Ege at the Sarong Club in San Francisco, by a girl named Rosalind, who was working with me in the Follies (R. 94); I had never met him before; Rosalind accompanied me to 395 Monterey Boulevard; Rosalind stayed there one night (R. 95-6); the first day I was there, Ege talked to me about prostitution (R. 97). Ege told me he was the interceptor for all these girls—their money; he said he had three or four girls—Ginger was married to him (R. 98-9); I was introduced to Ege as Cindy (R. 99); I went into prostitution because I wanted the money (R. 102); during the first week at Monterey Boulevard, neither Boyd nor Bruno came there (R. 102); Judy Berg and I went alone from San Francisco to Phoenix (R. 103); Ege first mentioned Phoenix a week or two after I left Folsom (R. 103); I saw Ege while in Folsom and told him I was scared and didn't know what I was doing (R. 105); Ege

⁴The cross-examination by the various counsel for defendants covers 107 pages. We omit portions which are mere repetitions of the witness's direct examination.

drove me from Folsom back to Sacramento (R. 107); it took about a week for Ege to find work for me after I came back from Folsom (R. 111).

At the Sarong Club, I heard Judy tell Ege that she was going to Phoenix (R. 114); Ege told me, "Here is \$50 as my share of the expense to Phoenix" (R. 116); I told Ege I was getting ready to go and that Judy and I were going to share the expense, and he gave me the money (R. 117-118).

Just Judy and I made the trip to Phoenix (R. 123); before leaving for Phoenix, Ege told me to go to Joe Boyd's place in Phoenix (R. 123); he did not give me any address—he just said, "Joe Boyd, Phoenix, Arizona" (R. 125). I didn't know exactly where Joe Boyd's was, except it was on the outskirts of Phoenix and Scottsdale (R. 126); Scottsdale is not very far from Phoenix (R. 127); Judy had the number to call Joe Boyd and she did (R. 127); Boyd had left a message to call somewhere else; then we went to the maid's house and she and her husband drove us to Scottsdale (R. 128); later that day, I saw Joe Boyd (R. 128).

Ege did not give me the telephone number of Boyd's place in Scottsdale and I can't say he gave it to Judy Berg (R. 164); I never had any telephone conversation with Mr. Boyd in Arizona (R. 164); I had never seen Joe Boyd until after the colored maid and her husband drove me to the place in Scottsdale (R. 165); I never made a phone call to Joe Boyd (R. 166).

I know I was in Phoenix sometime in October (R. 170).

When Judy and I arrived in Phoenix, Judy phoned some number as a result of which we got in touch with this maid and her husband (R. 183); I did not testify before the grand jury that I had done the telephoning to Mr. Boyd (R. 183).

As to the language in the indictment "that at 395 Monterey Boulevard in the City and County of San Francisco, the defendant, Edward Raymond Ege, gave the telephone number in Arizona of defendant, Joseph Boyd to Constance Marie Bell", Ege did not give that telephone number to me (R. 184).

As to overt act seven that "The defendant Joseph Boyd drove Constance Marie Bell in an automobile from Phoenix, Arizona, to Scottsdale, Arizona", in fact I was driven there by the husband of the colored maid and not by Mr. Boyd (R. 185).

I was not present at the time Ege telephoned to Scottsdale, Arizona, and talked to Joe Boyd (R. 271), I only know what somebody else reported to me (R. 271).

I never talked to Ege over the phone from Arizona (R. 275).

I did not make a phone call to Joe Boyd (R. 275) and if I so testified it was an error (R. 275).

Gene Giomi testified in substance as follows:

In the spring of 1952 I owned the premises at 395 Monterey Boulevard, San Francisco; at that time I rented the premises to Mr. and Mrs. Boyd (R. 195), from April 15, 1952 to May 15, 1953; at that time Boyd introduced Mr. Ege and told me he was going

to leave the State, and that Mr. and Mrs. Ege would carry on his obligations, so Ege occupied the premises from May 15, 1953 to January 29, 1954 (R. 196).

(Cross-Examination). The four checks you show were used by Ege to pay the monthly rent; the four checks (Defs' Ex. A) are dated September 22, 1953; October 29, 1953; November 20, 1953, and December 29, 1953 (R. 198); the checks could have been mailed in to me or handed to me personally (R. 200).

George W. Rathsen testified in substance as follows:

I am assistant manager at the El Rancho Hotel, Phoenix, Arizona, and was such in September, 1953; on September 20, 1953, I registered Mr. and Mrs. Boyd in the hotel; they checked out on October 21 (R. 204).

(Witness here identified Gov. Ex. 1 as the registration cards of the hotel showing the room occupied by the Boyds and long distance telephone calls made (R. 206).)

The majority of long distance calls made by Mr. and Mrs. Boyd were made to San Francisco (R. 207).

I do not know the number or to whom the long distance calls were made (R. 208).

S. W. Ellingson testified in substance as follows:

My post office address is Peoria, Arizona. In October, 1953, I owned a house three miles north of Scottsdale; on October 6, 1953, I rented the place to J. B. Boyd (R. 201-2) for one year with first and last months' rent payable in advance and was paid such advance rentals of \$300 on October 6 by Mr. Boyd

(R. 202); Boyd introduced me to his wife and told me he had been in the jewelry business in San Francisco and was looking to establish a jewelry business in Scottsdale (R. 203); Boyd moved out of the house about October 20 (R. 203).

Charles W. Briley testified in substance as follows:

I operate the Pink Pony bar and restaurant in Scottsdale, Arizona. In the first week of October, 1953 I had a conversation in the Pink Pony bar with Boyd whose wife was present (R. 209); I saw Boyd every day or other day after that over a period of two weeks; on my second meeting with Boyd he said he was interested in acquiring a residence in Scottsdale to operate a house of prostitution (R. 210-11); he said if I could send him any business he would appreciate it; I don't think I ever saw Boyd accompanied by anyone other than his wife who was introduced to me as Ginger (R. 211); when they first opened up the place he told me they had one girl, besides his wife who was running the place; he said there were two more girls supposed to show up from California (R. 212).

(Cross-Examination). I was never introduced to Boyd's wife as Ginger, I was introduced to her as Izzy (R. 213).

I recognized the witness Constance Marie Bell when she was on the stand in this case (R. 266); I had seen her and Judy Berg in the house in Scottsdale; I was in the Scottsdale house three or four times a week; I couldn't say how many times I saw Constance Marie Bell in the house; the house was opened

for about two weeks and Constance Bell was not there all that time (R. 267).

George H. Thomas, Jr. testified in substance as follows:

In October, 1953, I was a constable and deputy sheriff for the Precinct of Scottsdale at which time I met Joseph Boyd at Mr. Ellingson's home (R. 215); I talked to Boyd on more than one occasion; we probably discussed the fact that he was operating a house of prostitution there (R. 216); around the middle of October, Boyd told me they were leaving and I said that was a good idea (R. 217). I had occasion, between the time I first met Boyd and when he told me he was leaving, to visit the Ellingson house; on those visits I saw Mrs. Boyd, one time I saw a black-headed woman and another time I saw two blonde-headed ladies (R. 217).

Kenneth Ward Wright testified in substance as follows:

In December, 1953 I was a deputy sheriff of San Bernardino County (California). On December 21, 1953 I raided a house of prostitution, being the motels belonging to Tony's Spaghetti House, four miles east of Newberry, California, where three arrests were made (R. 219); I arrested one blonde, one red-head and one brunette girl; the blonde was booked under the name of Cindy Martin (R. 220).

John C. Moe testified in substance as follows:

As a special agent of the F.B.I., I interviewed Joseph Boyd in San Diego on January 12, 1955 (R. 231); Boyd said he was a gambler by occupation; he

first stated he could not recall where he was in the fall of 1953, he later stated during September, 1953 he was in Scottsdale, Arizona, where he stayed at the Palms Hotel (R. 233); he afterwards changed that to the El Rancho Motel where he stayed for 25 days; he stated that he planned to set up gambling and contacted the local constable who gave him the green light for poker and dice; that no payoffs were made to the constable; that another purpose of going to Scottsdale was to remarry his wife, whom he had married in Tia Juana, Mexico, in 1951, and that every year thereafter they remarried (R. 234); that his wife's name was Isadora McCormick and had also been known as Izzy, that she had never been known as Ginger (R. 234).

Boyd further stated that he rented the premises in Scottsdale from J. Walter Ellington; that he made no money gambling in Scottsdale (R. 235).

He stated he first met Ege in the Sarong Club, San Francisco, about two years previously when Ege was going to buy an interest in the Sarong Club; that his only contacts with Ege was when Ege took over Boyd's house in San Francisco; that he knew nothing of the activities on Monterey Street (sic) after he, Boyd left there; denied knowing anything about Ege's activities or associates (R. 236).

Boyd stated he was remotely acquainted with Joe Bruno; that he heard rumors that Bruno operated a house of prostitution, but thought Bruno too smart to be so involved; that he had played cards with Bruno on some occasions (R. 237); on showing him

photos of Miss Bell and Mildred Berg, he denied knowing either one (R. 237).

Ray M. Andress testified in substance as follows:

I am a special agent of the F.B.I. (R. 240); I first talked to Joseph Boyd at San Francisco on June 21, 1955, and the second talk on June 23, 1955 and again on September 6, 1955 (R. 241).

On June 21 I had a warrant for Boyd's arrest and explained to him he was arrested for violation of the White Slave Traffic Act and for conspiracy, he stated that if taking telephone calls from Edward Ege was conspiracy, then he had committed conspiracy; he admitted he had operated a house of prostitution at Scottsdale, Arizona, and that Constance Marie Bell and Marian Louise Berg had worked there for him as prostitutes (R. 243); that he went to Scottsdale the first part of October, 1953, and was there about three weeks (R. 243).

Boyd said there had been several telephone conversations with Ege while Ege was in San Francisco and he was in Scottsdale (R. 244).

On June 23, Boyd told me that he had been operating in that fashion in the last few years around the country that he had the house in Scottsdale; that he knew when Mrs. Bell left Scottsdale she came to Delano, California, but that arrangement was made by Ege and he, Boyd, had nothing to do with it; that Bruno had been operating a house around Delano for several years (R. 245-6).

On September 6, Boyd told me that Ege wanted him to say he did not have any telephone conversation

with Ege from Arizona and that he told Ege he couldn't do that because there had been a number of conversations (R. 247).

The government having rested its case, each defendant made a motion for judgment of acquittal and also motions to strike out testimony (R. 280).⁵

The court reserved rulings on the motions for acquittal until the conclusion of the case (R. 280); with regard to the various motions to strike the court stated (280):

"With regard to the various motions to strike which have been made, obviously in my instructions I am going to tell this jury what conversations and what acts are binding upon each defendant to the exclusion of others, so that I will try to the best of my ability to make it abundantly clear to the jury that certain conversations, for example, Boyd may have had with a variety of people, are not binding upon the other two defendants; that certain activities of Bruno are not binding upon the other defendants; that certain activities of Ege are not binding upon the other defendants.

⁵The record does not show the grounds of the motions but the present writer is informed the motions to strike by Boyd were made to the testimony of Constance Marie Bell relating all conversations and transactions between Constance Bell and Ege, and Judy Berg out of the presence of Boyd as hearsay, and that such conversations were inadmissible to prove the conspiracy as the *corpus delicti* had not been established by independent testimony; that the motion for judgment of acquittal was made on the ground of the insufficiency of the evidence. *If there is any question raised as to this, appellant asks that court make an order augmenting the record by including therein said motions to strike and said motions for acquittal.*

In other words, I have chosen that method of procedure rather than have the cumbersome and awkward situation of having each lawyer stand up and object and causing the Court to rule: 'Now, ladies and gentlemen of the jury, you will understand that this testimony is only being received (as for example), as against the defendant Bruno.' The result after a trial of the character of this is hopeless confusion in the minds of the jury.

I shall attempt to clarify that in my instructions, so that you may generally be apprised at this time that your motions to strike, insofar as I consider them apt and pertinent, will be granted, in certain respects. Obviously, I can't tell you that now because I haven't had a chance to review this transcript. However, I will cover that in a general way."

Thereupon Joseph Boyd rested his case (R. 281), as did the defendant Bruno (R. 282). Attorney for Boyd then stated that he understood that the defendant Ege was not going to rest and asked the court to instruct the jury that any evidence produced by Ege be limited to Ege alone (R. 282). The court stated it did not think it an appropriate time to get (sic) such an instruction.

Edward Raymond Ege testified in his own behalf in substance as follows:

I know Constance Marie Bell, I met her for the first time in 1953 at 395 Monterey Boulevard in San Francisco, where she was brought by a girl named Rosalind and introduced to me as "Cindy"; later I

knew her as Cindy Martin (R. 285); a few days later she came to 395 Monterey Boulevard; she said she had been living in town where some man was paying her keep and she wanted to get away, so I said, "Why don't you stay out here?" and she did (R. 286).

I own that property in Folsom since 1949 it is an old 11-room house. In October and September, 1953 it was not in use, then I let Barbara Reynolds take it (R. 286) I received no rent for it I went there to do some repair work and fix up the place; Frank Alvarez owns the property with me (R. 287).

I knew Joseph Boyd very vaguely, I met him a few times and took over his lease where he was living at 395 Monterey Boulevard I first met him in the Sarong Club (R. 288).

I have never known or saw Joseph Bruno until I saw him in this courtroom and never talked to him.

I believe that Constance Bell was in Folsom about one week and have heard that Judy took her there (R. 289).

After Folsom, Constance Bell, who I knew as Cindy Martin, returned to 395 Monterey and stayed there a day or so (R. 289); when she left my house I had no knowledge of where she and Judy went; I first learned from Constance Bell in Fresno that she and Judy had gone to Scottsdale, Arizona (R. 290).

(The witness categorically denied the allegations set forth in Overt Acts 1, 2, 3, 4, 5, 8, 10, 11, 12, 13 and 14 [R. 290-297].)

I never provided any place for Constance Marie Bell to ply her trade as a prostitute (R. 297); I never knew Joe Boyd was in Arizona (R. 294); I have never conspired with Joseph Boyd at any time for the purpose of moving Constance Marie Bell or any other girl from one State to another for purposes of prostitution (R. 292).

(Cross-Examination). My wife has been known as Ginger (R. 299); while I was working in the Sarong Club, Joe Boyd came in a couple of times and he asked me if I needed a place to live and that he had a place he was going to vacate and I said no; later I called his house to make an appointment and talked to the owner, Mr. Giomi, who said it was all right if I took over the lease (R. 308); I stayed there until the lease terminated in 1954. My wife stayed there, Constance Bell did for a short time and Judy stayed there some time (R. 309).

I don't believe after we saw Mr. Giomi that I saw Joe Boyd again; I never talked to Boyd from the time I took over the lease until July 9, 1955 (R. 313); when I met him at the bail bond office, I told him I was not guilty (R. 314); I never told Boyd that I would appreciate it if he would say nothing about the telephone conversations that he and I had when he was in Scottsdale (R. 315).

Constance Bell had a boy friend in San Rafael and sometimes I drove her there as a favor (R. 316) in my Cadillac.

I never knew Constance Bell used the name of Martin (R. 320).

On December 21, 1953, I was in Las Vegas, Nevada, where I came from San Francisco (R. 321); I drove in a Cadillac, I stayed in Las Vegas until the night of the 24th, and spent Christmas in San Francisco, I flew from Las Vegas to San Francisco (R. 322).

I made a trip to Fresno the latter part of 1953; on one occasion, Constance Bell called me and asked if I could come down and drive her back to San Francisco, which I did (R. 329).

After the court instructed the jury, a verdict was returned finding this appellant guilty on count two of the indictment (R. 30).

A motion for a new trial (R. 33) was made and denied (R. 37). The court sentenced appellant to imprisonment for five years (R. 38).

SPECIFICATION OF ERRORS.

1. *The court erred in denying appellant's motion for a judgment of acquittal.*

At the conclusion of the government's case appellant Boyd made a motion for a judgment of acquittal (R. 280) which motion was denied by the court (R. 30).

2. *The evidence was insufficient to support the verdict of guilty.*

3. *The evidence was insufficient to establish venue in the Northern District of California or to confer jurisdiction on the trial court.*

4. *The evidence was insufficient to establish the conspiracy charged in count two of the indictment.*

5. *The court erred in not instructing the jurors they must all agree on at least one of the overt acts.*

The court instructed the jury that to establish the charge of conspiracy the government must prove at least one of the overt acts set forth in the indictment (R. 342, 344, 347). The court failed to instruct that the jurors must all concur on at least one of the overt acts before a verdict of guilty could be found.

Mr. Stout (attorney for Ege) objected and excepted to the court's charge as failing to instruct as follows: "Unanimity of the jury as to the overt act proved by the government" (R. 357). The court denied the objection (R. 358).

ARGUMENT.

I. **THE FAILURE OF THE COURT TO INSTRUCT THAT THE JURORS MUST ALL AGREE ON AT LEAST ONE OF THE OVERT ACTS CHARGED NECESSITATES A REVERSAL OF THE JUDGMENT.** (Specification of Error No. 5.)

The second count of the indictment sets forth 14 overt acts. As hereafter argued several of these overt acts were not established by the evidence.

The court instructed the jury as to overt acts as follows:

“Accordingly, if you find beyond a reasonable doubt that the defendants conspired together to transport women, including Constance Marie Bell, in interstate commerce for the purpose of prostitution, and that any one of the overt acts charged was done in furtherance of the conspiracy, it is your duty to convict. The overt acts charged to have been done in furtherance of the conspiracy, as supplemented by a Bill of Particulars are as follows: (here the court reads to the jury at length the fourteen alleged overt acts).” (R. 340-342).

On page 344 the court defines an overt act and tells the jury that it is not necessary that all the overt acts be established, but that “at least one of these be proved and that it be in furtherance of the object of the conspiracy.”

On page 347 the court defines the various elements of the crime of criminal conspiracy and as to overt acts charged: “Fourth, that one of the conspirators thereafter knowingly committed at least one of the overt acts charged in the indictment. Fifth, that such overt act was committed in furtherance of an object or purpose of the conspiracy.”

Nowhere did the court instruct the jurors that they must all agree on at least one of the overt acts charged.

Without going through all of the 14 overt acts, we point out some that were not supported by the evidence.

Overt Act 5 alleges that on or about October 20, 1953, defendant Ege gave Constance Marie Bell the telephone number of Joseph Boyd in Arizona. Constance Bell testified that Ege told Judy that when they arrived in Phoenix she was to phone Joe Boyd at a motel or someplace (R. 73); that Ege did not give me the telephone number of Boyd's place in Scottsdale and I can't say he gave it to Judy Berg (R. 164); I never made a phone call to Joe Boyd (R. 166); as to the allegation in the indictment that Ege gave me the telephone number in Arizona of Joseph Boyd, Ege did not give that telephone number to me (R. 184).

Overt Act 6 alleges that on or about October 22, 1953, Constance Marie Bell, in Arizona, had a telephone conversation with Joseph Boyd. Constance Marie Bell denied this and testified as follows: "I never made a telephone call to Joe Boyd (R. 166). There is no evidence in the record of any phone conversation in Arizona between Constance Bell and Joe Boyd.

Overt Act 7 alleges that on or about October 22, 1953, Joseph Boyd drove Constance Marie Bell in an automobile from Phoenix, Arizona, to Scottsdale, Arizona. Constance Bell testified that from Phoenix to Scottsdale she was driven by the colored maid and her husband (R. 75); that she never saw Joe Boyd until after the colored maid and her husband drove her to the place in Scottsdale (R. 165).

The verdict returned against appellant was a general verdict of guilty. No special verdicts or findings

of the jury were returned as to the individual overt acts. Appellant Boyd moved the court for special findings and special verdicts on the overt acts (R. 359) which motion the court denied (R. 359).

Thus, the jury were allowed to consider all the 14 overt acts even though some were not supported by the evidence.

As the jury returned a general verdict there is no way of knowing (a) what overt acts the jurors agreed upon or (b) whether they found an overt act, not supported by the evidence, to have been done in furtherance of the conspiracy, or (c) whether some jurors found one overt act to have been committed and other jurors found some other overt act to have been committed.

Under well established principles of law a general verdict such as was returned in this case must be reversed where the court fails to instruct that all jurors must agree on at least one of the overt acts, where there are many overt acts and no special verdict or finding is made as to which act or acts the jury found to have been committed.

“In a criminal case the court must instruct on all essential questions of law involved, whether or not it is requested to do so. (citing cases)”

Samuel v. United States, (9 Cir.) 169 F. 2d 787.

In *Cramer v. United States*, 325 U.S. 1, 89 L.Ed. 1441, Cramer was indicted for treason and the indictment set forth 10 overt acts, 7 of which were withdrawn from the jury. A general verdict of guilty

was returned. The Supreme Court reversed because two of the three overt acts were not established by the evidence. In footnote 45 to the decision (325 U.S. 36) the court states:

“The verdict in this case was a general one of guilty, without special findings as to the acts on which it rests. Since it is not possible to identify the grounds on which Cramer was convicted, the verdict must be set aside if any of the separable acts submitted was insufficient. (citing cases).”

In *Haupt v. United States*, 330 U.S. 631, 91 L.Ed. 1145, the Supreme Court, in its footnote 1 to the case, explains the holding in the *Cramer* case as follows:

“When speaking of a general verdict of guilty in *Cramer v. United States*, 325 U.S. 1, 36, n.45, we said ‘Since it is not possible to identify the grounds on which Cramer was convicted, the verdict must be set aside if any of the separable acts submitted was insufficient’, of course we did not hold that one overt act properly proved and submitted would not sustain a conviction if the proof of other overt acts was insufficient. One such act may prove treason, and on review the conviction would be sustained, provided the record makes clear that the jury convicted on that overt act. But where several acts are pleaded in a single count and submitted to the jury, under instructions which allow a verdict of guilty on any one or more of such acts, a reviewing court has no way of knowing that any wrongly submitted act was not the one convicted upon. If acts were pleaded in separate counts or a special verdict were required as to each overt act of a single count, the conviction would be sustained on a

single well-proved act. As the acts were here pleaded in a single count, and the jury were instructed that they could convict on any one, we would have to reverse if any act were insufficient or insufficiently proved. Cf. *Stromberg v. California*, 283 U.S. 359, 368; *Williams v. North Carolina*, 317 U.S. 287, 292; *Cramer v. United States*, *supra*."

We are conversant with the cases which hold that it is not necessary that all the overt acts be established by the proof. We also know the cases holding that if the evidence established any one or more of many alleged overt acts the verdict will be sustained; *but in each such case the court instructed the jury that the jurors must all agree on at least one of the overt acts charged*.

In the absence of such an instruction, one or two of the jurors may have found that overt acts 1, 3 and 5 were committed, others may have found that overt acts 2, 7 and 10 were committed, while others may have found that different acts were committed. Thus no 12 jurors would have agreed that any one overt act was committed in furtherance of the alleged conspiracy. Neither this court nor any one else can determine which overt act or acts any particular juror or set of jurors based the guilty verdict upon (Cf. *Samuel v. United States*, *supra*).

Under the foregoing circumstances the verdict is void and the failure of the court to instruct the jury on so vital a matter constitutes prejudicial and reversible error.

In *Bollenbach v. United States*, 326 U.S. 607, 90 L.Ed. 315, our Supreme Court states:

“Discharge of the jury’s responsibility for drawing appropriate conclusions from the testimony depended on discharge of the judge’s responsibility to give the jury the required guidance by a lucid statement of the relevant legal criteria.”

and later states:

“A conviction ought not to rest on an equivocal direction to the jury on a basic issue.”

If an equivocal instruction on a basic issue requires a reversal of the judgment, then a total failure to instruct on such issue must likewise call for a reversal of the judgment. It was a basic proposition that the jurors all had to agree on the commission of at least one of the 14 overt acts, failure of the judge to so instruct resulted in no relevant legal criteria being furnished for the jury’s guidance.

II. THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH THE CONSPIRACY CHARGED IN COUNT TWO OF THE INDICTMENT. (Specification of Errors Nos. 1, 2, 4.)

First, we emphasize the fact that this brief deals solely with the guilt or innocence of the appellant Joseph Boyd. We leave to the arguments of their counsel the question of the guilt or innocence of Ege and Bruno.

The question here presented is whether the evidence under the law as announced in the decisions of our courts, was competent and sufficient to establish the

charge that Boyd conspired with either Ege, Bruno or anyone else to transport Constance Marie Bell or any woman in interstate commerce for the purposes of prostitution.

We submit that, under the law, the evidence was wholly insufficient to establish such charge.

(a) Fundamental principles governing the competency of proof to establish a criminal conspiracy.

The gravamen—*corpus delicti*—of the offense of criminal conspiracy is the agreement between two or more parties to do the prohibited act. (*United States v. Falcone*, 311 U.S. 205, 210; *Braverman v. United States*, 317 U.S. 49; *Lynch v. Magnavox Co.*, (9 Cir.) 94 F. 2d 883, 888).

The *corpus delicti*—the conspiring agreement—and the accused's connection therewith *cannot be established* by testimony as to acts and declarations of an alleged co-conspirator said or done in the absence of the accused. There must be independent proof of the conspiracy and the accused's connection therewith before such acts and declarations of an alleged co-conspirator can be considered as evidence against the accused.

In *Glasser v. United States*, 315 U.S. 60, 86 L.Ed. 680, four persons were indicted for conspiracy to defraud the United States. During the trial witnesses testified to statements made by the defendant Kretske during the course of the alleged conspiracy that implicated Glasser. Glasser claimed that such testimony

could not be considered as evidence against him in determining whether a conspiracy existed and that he was a party thereto. The Supreme Court upheld this contention and reversed the case as to Glasser stating, at page 74 of the reported case, as follows:

“Glasser contends that such statements constituted inadmissible hearsay as to him * * * . The Government attacks this argument as unsound, and, relying on the doctrine that the declarations of one conspirator in furtherance of the object of the conspiracy made to a third party are admissible against his co-conspirators. *Logan v. United States*, 144 US 263, 36 L.ed. 429, 12 S Ct 617, contends that the declarations of Kretske were admissible against Glasser and hence no prejudice could arise from Stewart’s failure to object. However, *such declarations are admissible over the objections of an alleged co-conspirator, who was not present when they were made, only if there is proof aliunde that he is connected with the conspiracy.* * * * *Otherwise hearsay would lift itself by its own boot straps to the level of competent evidence.*” (*Italics supplied*).

In *Minner v. United States*, (10 Cir.) 57 F. 2d 506, 511, (cited with approval in the *Glasser* case) the rule is thus stated:

“The existence of the conspiracy cannot be established against an alleged conspirator by evidence of the acts and declarations of his alleged co-conspirators done or made in his absence.”

In *Dolan v. United States*, (9 Cir.) 123 Fed. 52, 54, this court states the following rule:

“The rule is, of course, well settled that where the existence of a conspiracy is affirmatively shown the defendant would be bound by the acts and declarations of his co-conspirators, *but the conspiracy must be shown before a defendant can be bound by any declarations not made in his presence.*” (*Italics added.*)

In *Thomas v. United States*, (10 Cir.) 57 F. 2d 1039, 1042, the court announces the foregoing rule and then states:

“Therefore the statements made and acts done by Gorges in the absence of appellants should not be considered in determining whether the evidence established the connection of appellants with such conspiracy.”

In *Nibbelink v. United States*, (6 Cir.) 66 F. 2d 178, it is held:

“Before the declarations of co-conspirators can be received in evidence against one charged with participating in the conspiracy, it must be shown by independent evidence that the conspiracy existed and that the accused was a party to it at the time the declaration was made.”

It is a further rule of the law of conspiracy that declarations of an alleged co-conspirator that a third person is a member of the conspiracy, are incompetent to establish such third person's connection with the conspiracy.

“But, giving to the rules of evidence in conspiracy cases the widest reasonable latitude, we

are aware of no principle under which the declaration of one conspirator to another is competent to establish the connection of a third person with the conspiracy.”

Kuhn v. United States, (9 Cir.) 26 F. 2d 463;
Mayola v. United States, (9 Cir.) 71 F. 2d 65,
 67;

United States v. Renda, (2 Cir.) 56 F. 2d 601.

Lastly, is the rule that the *corpus delicti* cannot be established by the extra-judicial statements, admissions or confessions of the accused. (*Ryan v. United States*, 99 Fed. 864; *Goff v. United States*, 257 Fed. 294.) Such extra-judicial statements of a defendant are inadmissible in the absence of independent proof of the *corpus delicti* (*Wynkoop v. United States*, 22 F. 2d 799; *Mangum v. United States*, 289 Fed. 213; *Daeche v. United States*, 250 Fed. 566).

Applying the foregoing rules to the record herein, we will now point out (i) the evidence that cannot be considered in determining whether the conspiracy existed and whether Boyd was a member thereof, and (ii) the insufficiency of the remaining evidence.

(b) Evidence that must be eliminated and disregarded in determining whether the conspiracy existed and that Boyd was a member thereof.

The main witness relied on by the government to establish the conspiracy charged and Boyd's connection therewith was the woman Constance Marie Bell.

Applying the rule that statements and acts of an alleged co-conspirator, made out of the presence of

Boyd, cannot be used and are not evidence against Boyd, unless and until there be proof aliunde of the conspiracy and Boyd's connection therewith, *there must be disregarded each of the following matters testified to by Constance Marie Bell:*

(a) That after Constance Bell first met Ege, Ege explained to her how the prostitution racket operated, how the money was split and that she should bring the money earned to him (R. 66); that she worked as prostitute in Folsom and gave the money to Ege (R. 69).

(b) That Ege told her he had found a job for her (prostitution) in Phoenix, Arizona; that Ege told her she and Judy Berg could go to Phoenix together, share the expense and that Ege gave her \$50 toward the travelling expense (R. 71-2).

(c) That Ege told Judy Berg that when they arrived in Phoenix she was to phone Joe Boyd (R. 73).

(d) That she got a message that Ege was going to call her at a gas station; that Ege asked her how business was and she said it was bad, whereupon Ege told her that Delano was open and suggested that she go there (R. 77).

(e) That Ege told her when she arrived, by plane, in Los Angeles to phone Joe Bruno to meet her in Bakersfield, that Bruno met her and drove her to Delano; that Bruno told her the house in Delano was his and his old lady's; that Bruno was there almost every night and would help count the money (R. 78, 79, 81).

(f) The taking of the witness' money by Ege; that Ege told her all the girls gave their money to the man they were with (R. 81).

(g) That Ege told her about a job in Barstow and for her to get ready to go there (R. 85).

(h) That she phoned somebody in Las Vegas who told her that Ege would call for her; that Ege called for her and drove her to Las Vegas (R. 87).

Here it should be noted, that all the moving around by Constance Bell after she left Scottsdale and all her dealings thereafter with Ege and Bruno, undoubtedly were done after Joseph Boyd had anything to do with her, Ege or Bruno. In fact the record establishes that after Constance Bell left Scottsdale she had no further dealings with Boyd, and that Boyd and Ege had no contact one with the other, or that Boyd and Bruno ever had any contacts thereafter or any contacts relative to the alleged conspiracy.

Under the rule that the *corpus delicti* cannot be established by the extra-judicial statements of Boyd, *the following testimony must be eliminated and disregarded in determining whether the conspiracy existed and Boyd was a member thereof.*

(a) Testimony of Charles W. Briley, the operator of the Pink Pony Bar in Scottsdale, that Boyd told him he was interested in operating a house of prostitution in Scottsdale (R. 210); that when Boyd opened up the place Boyd said he had one girl but that two more girls were supposed to show up from California (R. 212).

(b) Testimony of George H. Thomas, Jr., constable and deputy sheriff of Scottsdale, that he talked to Boyd in the Ellingson house and probably discussed the fact that he was operating a house of prostitution there (R. 216).

(c) Testimony of Ray M. Andress, F.B.I. agent: that on June 21, 1955, Boyd admitted he had run a house of prostitution in Scottsdale; that Constance Bell and Marion Berg had worked there as prostitutes (R. 243); that Boyd said there had been several telephone conversations between him and Ege while he was in Scottsdale (R. 244). That on September 6, 1955, Boyd told him that Ege wanted Boyd to say that he did not have any telephone conversation with Ege from Arizona and that he told Ege he couldn't do that because there had been a number of conversations (R. 247).

(c) There is no competent evidence establishing that Boyd ever became a member of the alleged conspiracy.

Though the evidence may be sufficient to establish that a conspiracy existed between Ege, Constance Marie Bell and Judy Berg for the transportation in interstate commerce of these women for purposes of prostitution, there is no competent evidence to establish that Boyd ever became a part of this conspiracy.

Constance Bell testified that she never met Boyd until after she arrived at the Ellingson house in Scottsdale (R. 165); she further testified that she never had telephoned to Boyd (R. 164, 166).

There is no competent evidence in the record that Boyd and Ege ever had any meetings, talks or agreements relative to prostitution before or after Ege took over the lease on the house on Monterey Boulevard.

There is no evidence in the record that Boyd and Bruno ever met, talked or agreed as to the transportation of any woman from California to any other state. In fact there is no evidence in the record that Bruno had anything to do with the conspiracy charged.

The only competent evidence against Boyd relating to the alleged conspiracy and his connection therewith is as follows: that prior to May, 1953, Boyd had leased and occupied the house on Monterey Boulevard, San Francisco; that in May Boyd told the owner, Gene Giomi, that he was going to leave the state and that Mr. and Mrs. Ege would carry on his obligations and take over the lease; that thereafter Ege occupied the premises (Testimony of Giomi, R. 196).

The next evidence as to the Boyds is that on September 20, 1953, Mr. and Mrs. Boyd registered at the El Rancho Motel in Phoenix, Arizona, where they stayed until October 21; that the Boyds made long distance calls to San Francisco, parties spoken to unknown (Testimony of Rathsen, R. 204-208).

That on October 6, 1953, S. W. Ellingson rented a house in Scottsdale to J. B. Boyd for one year, first and last months rent paid in advance; that the Boyds moved out on October 20th (Testimony of Ellingson, R. 201-3).

That Constance Marie Bell (and Judy Berg) arrived in Arizona sometime in October, 1953, where she (they) started working as prostitutes in the Ellingson house (Bell, R. 75). There is no evidence that either the Bell or Burke woman ever knew Boyd until they arrived in Scottsdale or ever had any contact with him.

Briley, the operator of the Pink Pony Bar, testified that on 3 or 4 days a week he visited the Scottsdale house during the two weeks it was opened (R. 267), that he recognized Constance Bell and Judy Berg as two of the women he saw there (R. 266); that Constance Bell was not there all of the two weeks the house was opened (R. 267).

Thomas, the Scottsdale constable, testified that he visited the house in Scottsdale and there saw Boyd, Mrs. Boyd, a black-headed woman and two blonde ladies (R. 216, 217).

Constance Bell testified that she left Scottsdale for California at the instigation of Ege (R. 77).

There is no evidence that Boyd knew of this talk between Bell and Ege or had anything to do with Constance Bell going from Arizona back to California.

That Boyd operated a house of prostitution in Scottsdale for about two weeks may be admitted for purposes of argument and that Constance Bell and probably Judy Berg worked there as prostitutes. But there is no evidence to establish that Boyd had anything to do with these or any other women coming from California to Arizona or from leaving Arizona for California.

Boyd was not on trial for operating a house of prostitution in Arizona or anywhere else.

There is not one bit of testimony that prior to the coming to Arizona of Bell and Berg or anyone else that Boyd knew they were coming from California, or that he had arranged with Ege or anyone else that they were to come to Arizona, or that Ege or anyone else had informed him they were coming from California to Arizona for purposes of prostitution or at all.

There is no evidence that Boyd knew anything about Bell or Berg until they arrived at the house in Scottsdale.

All of Constance Bell's testimony as to her activities and those of Ege after she left Arizona, her going to Delano as a prostitute, her going to Barstow where she was arrested in a raid on a house of prostitution, her going to Sacramento and Isleton where she worked as a prostitute, her giving her earnings to Ege, may be competent evidence against Ege; but there is no evidence that Boyd had anything to do with these activities or that he even knew of these matters. Each and all of these matters were the independent acts of Bell and Ege. As independent acts of Bell and Ege they formed no part of the conspiracy here charged. Several independent conspiracies cannot be put together to form one conspiracy and proof of independent conspiracies between different members of one claimed conspiracy does not furnish proof of the one conspiracy charged against all alleged conspirators (Cf. *Kotteakos v. United States*, 328 U.S.

750; *Tinsley v. United States*, (8 Cir.) 4 F. 2d 891; *Terry v. United States*, (9 Cir.) 7 F. 2d 28, 30; *Minner v. United States*, 57 F. 2d 506, 512).

It may be argued by the government that, as a conspiracy existed between Ege and Bell and possibly Judy Berg that Bell and Berg be transported from California to Arizona for purposes of prostitution, when Boyd took these women into the Scottsdale house as prostitutes he adopted and became a part of such conspiracy. Such is not the law.

Before one can become a member of a pre-existing conspiracy he must know the purpose and object of such conspiracy and having such knowledge participate in the unlawful enterprise (*Marino v. United States*, (9 Cir.) 91 F. 2d 691; *Lee v. United States*, (9 Cir.) 106 F. 2d 906; *Dahly v. United States*, (8 Cir.) 50 F. 2d 37). Those having no knowledge of the conspiracy are not conspirators (*United States v. Falcone*, 311 U.S. 205, 210, 85 L.Ed. 128, 132; *Direct Sales Co. v. United States*, 319 U.S. 703, 711, 87 L.Ed. 1674; *Morrison v. California*, 291 U.S. 82, 93, 78 L.Ed. 664, 672).

Here, there is not one whit of testimony that Boyd had any knowledge of any conspiracy, agreement or arrangement between Ege and Bell or Berg or anyone else that Bell or Berg or any other woman was to be transported from California to Arizona or Nevada or from Arizona to California.

III. THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH
VENUE IN THE NORTHERN DISTRICT OF CALIFORNIA
OR TO CONFER JURISDICTION ON THE TRIAL COURT.
(Specification of Error No. 3.)

We understand that the foregoing insufficiency of the evidence to establish venue and jurisdiction is being argued in the brief filed on behalf of appellant Bruno. We adopt such argument without setting forth the same herein.

CONCLUSION.

For each of the foregoing reasons the judgment against Joseph Boyd should be reversed.

Dated, San Francisco, California,
June 4, 1956.

Respectfully submitted,

LEO R. FRIEDMAN,

*Attorney for Appellant
Joseph Boyd.*

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